No. 22,393

ted States Court of Appeals

FOR THE NINTH CIRCUIT

GREAT FALLS COMMUNITY TV CABLE CO., INC.,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION

and

UNITED STATES OF AMERICA,
Respondents,

HARRISCOPE BROADCASTING CORPORATION,
SNYDER & ASSOCIATES,
TELEPROMPTER TRANSMISSION OF KANSAS, INC.,
Intervenors.

On Petition for Review of An Order of the
Federal Communications Commission

REPLY BRIEF

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PRELIMINARY STATEMENT

This petition for review generally challenges the jurisdiction of the FCC to regulate CATV, whether microwave fed or off-the-air, and specifically challenges the validity of the CATV non-duplication rules as contained in 47 CFR 21.712 and 74.1103. The challenge against the non-duplication rules are both on constitutional grounds — free speech and due process — and on statutory limitations.

Petitioner moved for a stay of the Commission's order imposing the non-duplication rule, which was granted by order of this Court on January 10, 1968. Respondents in their opposition to the stay asserted that the jurisdiction of the Commission to regulate microwave CATV was "well established", and despite the writ of certiorari to this Court in *Southwestern Cable Co. v. United States,* 378 F.2d 118 (9th Cir., 1967), *cert. granted* 389 U.S. 911 (1967),(reviewing the question of Commission jurisdiction to regulate non-microwave CATV),advised at oral argument through the General Counsel of the FCC that they were prepared to defend their microwave fed CATV jurisdiction here. After a month's extension of time to file their answering brief, respondents have decided not to defend their jurisdiction or make serious response to any of the issues raised in petitioner's brief, but to rely instead upon a procedural challenge of petitioner's right to raise these issues here without first having "afforded the Commission an opportunity to pass upon them".[1] The doctrine upon which respondents rely is misstated in their brief, has no application to the circumstances here, and ignores the controlling rule of this Circuit. Respondents' hyperbole necessitate this reply.

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[1] This is a switch in the Commission's tactics. More often the Commission makes broad explanation and rationale of its jurisdiction in appellate reviews which do not challenge its jurisdiction. In this manner the Commission has had its CATV jurisdiction reasserted in the dicta of opinions, for example, *Wheeling Antenna Co., Inc. v. United States and Federal Communications Commission*, __F.2d__, (4th Cir., decided February 28, 1968). Here, if the Court were to deny jurisdictional review on the procedural ground, no doubt the Commission would cite the opinion as reaffirmance of its assumption of jurisdiction, while never having submitted it to a judicial examination.

ARGUMENT

PETITIONER WAS NOT REQUIRED TO ASSERT BELOW ISSUES REPEATEDLY RAISED BEFORE THE COMMISSION AND SUMMARILY AND CONSISTENTLY REJECTED IN ACCORDANCE WITH ITS FIXED POLICY

Respondents assert that Section 405 of the Communications Act "unequivocally establishes that 'no question of fact or law' may be raised on appeal which petitioner has not first raised before the Commission". The Act does not make such "unequivocal" requirement nor does judicial precedent. Furthermore, the Commission's opportunities to pass upon its jurisdiction over CATV are legion. These opportunities include rulemaking proceedings, court reviews in various circuits and the Supreme Court, applications for waivers of the rules, and a direct challenge by petitioner's parent corporation in separate actions. In each instance the Commission action has been the same. To now assert that the Commission has not had an opportunity to pass upon its jurisdiction is to waste the time of this Court. We review below only a small sample of the opportunities and Commission action.

After a history of denial of its jurisdiction over CATV, jurisdiction was first asserted over microwave-fed CATV in the *First Report and Order,* 38 FCC 683 (1965). The jurisdiction is reasserted and enlarged to cover all CATV in the *Second Report and Order,* 2 FCC 2d 725 at 726 (1966). In answer to petition for reconsideration of the *Second Report,* the Commission again reasserted its jurisdiction with an expanded memorandum on its jurisdiction, 6 F.2d 309 at 310 (1967). Direct reviews of the *First* and *Second Reports* were taken in the D.C. Circuit, the Fifth, Sixth, Eighth and the Ninth Circuits, and consolidated for review in the Eighth Circuit which were submitted in October of 1967.[2] They are yet to be decided.

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[2] The cases are: *Midwest Video, et al v. FCC et al,* No. 18,052, originating in Eighth Circuit; *Midwest Video et al v. FCC et al,* No. 18,348, originating in Eighth Circuit; *Midwest Television, Inc. v. FCC et al,* Nos. 18,481 and 18,482, originating in D.C. Circuit; *Alice Cable*

(Continued)

Petitioner's parent company, TelePrompTer Corporation, participated in both FCC rulemakings which culminated in adoption of the *First* and *Second Reports* on CATV and raised objections based primarily upon First Amendment and jurisdictional grounds — issues passed upon and rejected by the Commission. Indeed, TelePrompTer Corporation, in connection with other of its CATV operations, raised before the Commission *each* of the issues now before this Court and had each repudiated in summary fashion. See Appendix I hereto, reproduced from FCC Reports (7 FCC 2d 604 (1967)) typifying Commission treatment of the questions upon which it now asserts it has had "no opportunity" to pass.

On a test of application of the rules contained in the *Second Report,* this Court placed the Commission's jurisdiction in doubt in *Southwestern Cable Co. v. United States,* 378 F.2d 118 (9th Cir., 1967). Whereupon, the Commission successfully had its jurisdiction reaffirmed in the D.C. Circuit in *Buckeye Cablevision Inc. v. Federal Communications Commission,* 387 F.2d 220 (D.C. Cir., 1967), (where the jurisdictional issue had not been raised by the petitioner),[3] and on the strength of a conflict in circuits the Commission took *Southwestern* to the Supreme Court, *cert. granted,* 389 U.S. 911 (1967).

While this jurisdictional issue has been pending in the courts, the Commission has exercised the disputed jurisdiction with heady confidence. In its standard rebuff to a challenge of jurisdiction, the Commission entones with

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[2] (Continued)
Television Corp. v. FCC et al, No. 18,753, originating in Fifth Circuit; *Buckeye Cablevision, Inc. v. FCC et al,* No. 18,813, originating in Sixth Circuit; and *Mission Cable TV, Inc., et al v. FCC et al,* No. 18,839, originating in Ninth Circuit.

[3] *Buckeye* demonstrates the Commission's tactical skill. In the D.C. Circuit it had its jurisdiction reaffirmed where it had not been challenged on review. Here, the Commission seeks to bar review, where petitioner has squarely raised it, on the grounds that it had not had an "opportunity" to pass upon this issue below.

monotonous regularity from its "boiler plate" opinions[4] that the issue of jurisdiction has been fully disposed of in the *Second Report and Order* and it is unnecessary to reconsider it. Some recent samples from Commission opinions are:

Texas Community Antennas, Inc., ___F.C.C.2d ___, 12 R.R. 2d 942 (FCC 68-395, April 15, 1968):

> [T]he basis for the Commission's jurisdiction was discussed in the *Second Report and Order* so that it is unnecessary to review it here;. . .

Mountain State Cable, Inc., 9 F.C.C.2d 915 (1967):

> Our reasons for rejecting petitioner's contention that the Commission lacks jurisdiction over off-the-air CATV systems are given in the *Second Report and Order,* and we do not believe they need be repeated here.

Top Vision Cable Co., 8 F.C.C.2d 895 (1967):

> Finally, the *Second Report and Order* and our subsequent reconsideration thereof set forth our grounds for asserting jurisdiction; they need not be repeated here.

TV Transmission, Inc., 6 F.C.C.2d 296 (1967):

> We explained our grounds for asserting jurisdiction over off-the-air CATV systems in the *Second Report and Order,* and we will rely on that discussion in this proceeding.

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[4] Because of the heavy load of matters before it, the Commission for the most part does not write its own opinions. This extraordinary procedure is openly acknowledged and structured in the bureaucratic process by funnelling all matters pending for Commission determination through the Office of Opinions and Review, 47 C.F.R. 0.171, which wades through the pleadings, prepares a proposed opinion and submits this to the Commission, thus relieving the over-taxed Commissioners from the added burden of even reading pleadings.

TelePrompTer Corporation, Santa Cruz, California, 6 F.C.C.2d 299 (1967).[5]

> Furthermore, the Commission is satisfied that the basis for its authority was adequately set forth in the *Second Report.*

Not only has the Commission had more than ample opportunity to pass upon the issues raised here, but it has maintained a frozen attitude to these issues and refuses to give them any examination or response in its opinions. To require petitioner to have challenged the Commission's jurisdiction in its request for waiver would have been idle in the extreme and tactically unsound,since it would have jeopardized a case on the merits.

In addition to ample opportunity to pass upon its jurisdiction, it is well established that subject matter jurisdiction can be raised at any judicial level. In *Mansfield, Coldwater & Lake Michigan Railway Company v. Swan,* 111 U.S. 379 at 382 (1884) the Court explained:

> On every writ of error or appeal, the first and fundamental question is that of jursidiction, first, of this court, and then of the court from which the record comes. This question the court is bound to ask and answer for itself even when not otherwise suggested, and without respect to the relation of the parties to it.

Unlike jurisdiction over the parties, subject matter jurisdiction cannot be waived, *People's Bank v. Calhoun,* 102 U.S. 256, 260-261 (1880); *Page v. Wright,* 116 F.2d 449, 453 (7th Cir., 1940). Moreover, a party cannot be estopped from raising a want or jurisdiction. *American Fire & Casualty Co. v. Finn,* 341 U.S. 6, 17-18 (1951). Jurisdiction can

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[5] This latter case was asserted by petitioner's parent corporation. See also *TelepromptTer Corporation* 7 FCC 2d 604 (1967), set forth in Appendix I hereto.

even be raised by the party who in the first instance invoked the Court's jurisdiction, *American Fire & Casualty Company v. Finn, supra,* and the court may on its own motion demand that jurisdiction be clearly demonstrated even when not raised by the parties, *McNutt v. General Motors Acceptance Corporation,* 298 U.S. 178 (1936). Thus, it is clear that the Commission's jurisdiction is a necessary issue before this Court.

Likewise, the constitutional issue of free speech has been passed upon by the Commission and is properly at issue here. The free speech issue was passed upon by the Commission in the *Reconsideration of the Second Report and Order,* 6 FCC 2d 309 at 310 (1967). Also, it has frequently been raised before the Commission and rejected out of hand by citing the *Second Report* as the sole authority. *Helena Television Co.,* __FCC 2d __, 12 R.R.2d 1163 (FCC 68-422, decided April 22, 1968); *Texas Community Antennas, Inc.,* __FCC 2d __, 12 R.R.2d 942 (FCC 68-395, decided April 15, 1968); *Allen's Television Service, Inc.,* __FCC 2d __, 12 R.R.2d 1030 (FCC 68-399, decided April 15, 1968); *Ellensburg Television Cable Corp.,* 7 FCC 2d 110 (1967); *Minnesota CATV, Inc.,* 7 FCC 2d 943 (1967); *TelePrompTer Corp.,* 7 FCC 2d 604;[6] *Total Telecable, Inc.,* 7 FCC 2d 611 (1967), now on review before this Court, in No. 21,990.

The same is true with respect to Commission's review and rejection of the right to hearing in a waiver petition. *Texas Community Antennas, Inc.,* __FCC 2d __, 12 R.R.2d 942 (FCC 68-395, April 15, 1968); *Allen's Television Service, Inc.,* __F.2d __, 12 R.R.2d 1030 (FCC 68-399, April 15, 1968); *TelePrompTer of Liberal, Inc.,* 8 FCC 2d 473 (1967); *Douglas Antenna Cable TV,* 8 FCC 2d 317 (1967); *Ellensburg Television Cable Corp.,* 7 FCC 2d 110 (1967); *Minnesota CATV, Inc.,* 7 FCC 2d 943 (1967); *TelePrompTer Corporation,* 7 FCC 2d 604 (1967); *Total Telecable, Inc.,* 7 FCC 2d 611 (1967); *TelePrompTer of Liberal,*

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[6] Set forth in full in Appendix I hereto.

Inc., 7 FCC 2d 120, (1967); *Tehachapi TV Cable Co.*, 6 FCC 2d 469 (1967); *Total Telecable, Inc.*, 8 FCC 2d 997 (1967). In fact each issue which has been raised in this review is examined in both the majority and dissenting opinions of the *Second Report and Order, supra,* and have been separately asserted before the Commission by petitioner's parent and affiliated corporations.

Without stating by name, the respondents apparently rely upon the doctrine of exhaustion of administrative remedies before seeking review in the courts. The confused opinions in this area are weighed by Professor Davis in his authoritative study of administrative law (3 Davis, *Administrative Law* 67, §20.03):

> As we have just seen, the Supreme Court cases go both ways on the question whether administrative jurisdiction may be challenged without exhausting administrative remedies. Not only are the holdings often irreconcilable, but no opinion of the Court explains the contrariety of holdings. Indeed, the word formulations in the opinions are inadequate, conflicting, and usually affirmatively misleading.

Professor Davis suggests a way out of the darkness by making the requirement of prior administrative review dependent upon three key factors (3 Davis, *Administrative Law* 69):

> . . . [E]xtent of injury from pursuit of administrative remedy, degree of apparent clarity or doubt about administrative jurisdiction, and involvement of specialized administrative understanding in the question of jurisdiction.

These guidelines have been adopted by this Court in *Lone Star Cement Corporation v. Federal Trade Commission,* 339 F2d 505 (9th Cir., 1964), cited with favor by Professor Davis in the pocket supplement to Section 20.03 of his text. When applied to this review they support a full review of the issues pending before the Court.

First, the issue of administrative jurisdiction in the Commission's view has been definitively resolved and the result of any submission of this issue is a foregone conclusion. Where submission to the agency constitutes only an idle act or a mere formality it is not a prerequisite for review. *Levers v. Anderson,* 326 U.S. 219, 222-223 (1945). The law generally does not require a party to perform an idle act.

Secondly, the issues to which the Commission seeks to foreclose examination are for the most part beyond the ambit of the Commission's technical expertise or specialized knowledge. There are no factual issues requiring Commission resolution, nor are there legal issues within its special administrative knowledge. Statutory construction and constitutional issues of free speech and due process are issues more appropriate to the consideration of the courts. *Public Utilities Commission of California v. United States,* 355 U.S. 534, 539-540 (1958); *Chicago v. Atchison Topeka & Santa Fe Railway Co.,* 357 U.S. 77 (1958).

And lastly, the petitioner has demonstrated in its application for stay that enforcement of the Commission order would cause it irreparable harm. The Commission resisted the stay in this Court despite the absence of any corresponding compelling reasons for enforcement. From this Commission intransigence and past performance (including a denial of a stay of the *Second Report and Order* itself pending reconsideration. 3 F.C.C.2d 816 (1966)) it is logical to infer that the Commission would have denied a stay[7] to petitioner during the pendency of a petition for reconsideration before it – a period frequently in excess of a year, even when decided without examination. Thus, the only possible avoidance of irreparable harm was to immediately proceed in this Court.

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[7] Filing of a petition to reconsider under the Commission's rules does not stay its order, 47 C.F.R. 1.108(n).

Section 405 of the Communications Act does not require that the petitioner assert his grounds before the Commission to preserve them for review. It states only that the Commission shall have been afforded an opportunity to pass upon them. The myriad of such opportunities have been demonstrated above. Additionally, the exceptions to this statutory statement of exhaustion of administrative remedies has been examined above. Furthermore, the cases upon which respondents principally rely assert no such inflexible rule.

CONCLUSION

For the foregoing reasons, respondents' argument of exhaustion of administrative remedies is without substance or merit.

Respectfully submitted,

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May 17, 1968

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Alan Raywid

FCC 67-393

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re
TELEPROMPTER CORP., JOHNSTOWN, PA., AND ELMIRA, N.Y.
Request for Waiver of Section 74.1103 of the Commission's Rules

MEMORANDUM OPINION AND ORDER

(Adopted March 29, 1967)

BY THE COMMISSION: COMMISSIONER BARTLEY DISSENTING AND ISSUING A STATEMENT; COMMISSIONER LOEVINGER CONCURRING IN THE ORDER; COMMISSIONER JOHNSON ABSENT.

1. On June 17, 1966, TelePrompTer Corp., owner and operator of CATV systems in Johnstown, Pa., and Elmira, N.Y., filed a petition to set aside, stay, annul, suspend, and/or waive CATV nonduplication rules, in which it requested waiver of the program exclusivity requirements of section 74.1103(e) of the Commission's rules. Oppositions to the Johnstown request were filed by Rivoli Realty Co., permittee of station WARD-TV, and WJAC, Inc., licensee of station WJAC-TV, both in Johnstown, Pa.; opposition to the Elmira request was filed by Newhouse Broadcasting Corp., licensee of UHF station WSYE-TV, Elmira, N.Y.; and Triangle Publications, Inc., licensee of stations WFBG-TV, Altoona, Pa., and WNBF-TV, Binghamton, N.Y., filed an opposition addressed to both requests. TelePrompTer replied.

2. TelePrompTer, through its wholly owned subsidiary Johnstown Cable TV, operates a 5-channel off-the-air CATV system in Johnstown, Pa., which supplies approximately 10,470 subscribers with the following Pennsylvania television signals: KDKA-TV (CBS), WTAE (ABC), and WIIC-TV (NBC), Pittsburgh; WFBG-TV (ABC, CBS), Altoona; WJAC-TV (NBC) and WARD-TV (CBS), Johnstown. Stations WFBG-TV, WJAC-TV, and WARD-TV provide predicted grade A contours, and stations KDKA-TV, WTAE, and WIIC-TV provide predicted grade B contours over Johnstown. Similarly, through its wholly owned subsidiary, Elmira Video, TelePrompTer operates a 12-channel CATV system in Elmira, N.Y., which supplies approximately 16,041 subscribers with the following signals: Off-the-air—WINR-TV (NBC), WNBF-TV (CBS), and WBJA-TV (ABC), Binghamton; WSYE-TV (NBC), Elmira; WHEN-TV (CBS) and WNYS-TV (ABC), Syracuse, all New York; WDAU-TV (CBS), Scranton, Pa.; via microwave [1]—independent

[1] In its waiver request, the petitioner indicated that it did not employ microwave; however, we rely on its later-filed form 325 which indicates that it now does so.

stations WPIX, WOR-TV, and WNEW-TV, from New York City Stations WNBF-TV and WSYE-TV provide predicted grade A con tours, and station WBJA-TV provides a predicted grade B contou over Elmira. TelePrompTer requests a blanket waiver of sectio 74.1103(e) of the rules for both the Johnstown and Elmira CATV systems in order to avoid furnishing program exclusivity.

3. In support of its waiver request, TelePrompTer urges: (*a*) Tha in view of the copyright decision in *United Artists Television, Inc.* v *Fortnightly Corporation*, 255 F. Supp. 177, appeal pending before th U.S. Court of Appeals for the Second Circuit (docket No. 30767), broadcaster should not be entitled to assert its rights under sectio 74.1103 of the rules without first agreeing to indemnify a CATV oper ator for its potential copyright liability; (*b*) that the broadcaster should be required to pay the CATV operator's cost resulting fro implementation of program exclusivity; (*c*) that section 74.1103 of th rules should not be applied without first affording the CATV operato a hearing; (*d*) that the application of section 74.1103 of the rul would inhibit the distribution of constitutionally protected materi (under the first amendment to the Constitution of the United States as well as violate section 326 of the Commission's act, and the Com mission has never decided whether it possesses authority to restrai distribution of constitutionally protected communications whe radio stations are not involved; and (e) that since it has been hel that a CATV system's operation does not constitute "unfair compet tion," citing *Cable Vision, Inc.* v. *KUTV, Inc.*, 335 F. 2d 348, cert. den 379 U.S. 989, this is an improper basis for the Commission's assertio of jurisdiction.

4. TelePrompTer's arguments are considered sequentially belo (*a*) No question of copyright liability can arise where, as here, onl deletion of a program from a CATV system is at issue; (*b*) the burde of a governmentally imposed expenditure upon an industry is not v olative of the fifth amendment where the end result is legitimate an the means are rational. See, e.g., *Day-Brite Lighting, Inc.* v. *Missou* 342 U.S. 421; *California State Auto. Ass'n Inter-Insurance Bureau Maloney*, 341 U.S. 105; *Buchwalter* v. *Federal Trade Commission*, 2 F. 2d 344. Moreover, TelePrompTer had the opportunity to parti ipate in the rulemaking and was on notice that it would be affecte when the rules went into operation; (*c*) section 74.1109(f) of the rul makes provision for hearings; however, TelePrompTer's threshol factual allegations do not persuade us that a hearing is necessary here (*d*) this question was considered and disposed of on reconsideratio of the *Second Report and Order* and we rely on our discussion ther paragraph 2 et seq., FCC 67-34, 6 FCC 2d 309: (*e*) the *KUTV* ca did not consider or purport to deal with the unfair competition aspe developed in the *Second Report and Order* under the public-intere standard of the Communications Act of 1934, as amended. That ca simply held that parties in a private suit must proceed under copy right law, rather than on the concept of unfair competition or inte ference with contractual rights, in view of such decisions as *Sear Roebuck & Co.* v. *Stiffel Co.*, 367 U.S. 225, and *Compco Corp.* v. *Day Brite Lighting, Inc.*, 376 U.S. 234.

5. In view of the foregoing, the Commission finds that a grant of the requested waiver of section 74.1103(e) of the Commission's rules would not be consistent with the public interest.

Accordingly, *It is ordered*, This 29th day of March 1967, that the petition to set aside, stay, annul, suspend, and/or waive CATV nonduplication rules, filed by TelePrompTer Corp. on June 17, 1966, requesting waiver of section 74.1103(e) of the Commission's rules as it relates to the petitioner's operation of Johnstown Cable TV, Johnstown, Pa., and Elmira Video, Elmira, N.Y., *Is denied.*

It is further ordered, That TelePrompTer Corp. *Is directed* to comply with the requirements of section 74.1103(e) of the Commission's rules on its CATV systems described above within 30 days of the release date of this memorandum opinion and order.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

DISSENTING STATEMENT OF COMMISSIONER ROBERT T. BARTLEY

In my opinion, the CATV rules are invalid and waivers are not necessary. However, assuming their validity, I would here grant full relief as requested by the CATV.

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